



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Criminal Appeal 79 of 2011

JULIUS MJOMBA MWAKISAU 1ST APPELLANT

SIMON MWANGANGI NZOLE 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No.1097 of 2009 of the Senior Principal Magistrate's Court at Voi – E.M. Muriithi – SPM

JUDGMENT

JULIUS MJOMBA MWAKISAU and **SIMON MWAGANGI NZOLE** hereinafter referred to as “**the appellants**” were jointly charged with four others with the offences of **ROBBERY WITH VIOLENCE** contrary to Section 296 (2) of the Penal Code in two counts.

The particulars of the 1st count are that

“On the 20th day of October, 2009 at Musau area in Mwatate District within the Coast Province, jointly with others not before court while armed with dangerous weapons namely iron bars, pangas, knives and stones robbed PETER KINONA MASUDI Kshs. 38,000/- gemstones (green garnet) one radio cassette make sony, DVD Machine make Sony, two remote targets, ten loaves of bread, four boxes of UHT milk all valued at Kshs. 500,000 and at or immediately after the time of such robbery wounded the said PETER KINONA MASUDI”

And the particulars of the second count states that:

“On the 20th day of October 2009 at Musau area in Mwatate District within the Coast Province jointly with others not before court, while armed with dangerous weapons namely iron bars, pangas, knives and stones robbed VICTORIA KINONA 2 golden rings, assorted clothes and one hand bag all valued at Kshs. 10,000 and at or immediately before or immediately after the time of such robbery wounded the said VICTORIA KINONA.”

The appellants took a plea of **NOT GUILTY** on both counts. They were subsequently tried and convicted. They were convicted on the 1st count only. They were each sentenced to serve **LIFE IMPRISONMENT**. Being aggrieved, they have appealed against the conviction and sentence. In view of the fact that, the appeal herein relates to the conviction and sentence on the 1st count only, we shall restrict ourselves to the issues relating to the same. In that regard, the prosecution case is that, Peter Kinona Masudi (PW1) was asleep in his house at Mengo, Kishembe Mwatete. He was with his family members. At about 11.00 p.m. he woke up to go and check on his goats. He did and returned to the house. He locked the main door to the house. He moved to the bedroom. As he returned the bedroom door, he heard a loud bang on the main door. It was a bang of a huge stone thrown at it. He suddenly realised that many people had entered the house. They pushed the bedroom door. The door gave in. It fell inside the bedroom. The attackers who had torches, beamed at him. He fell on the ground. They attacked him with pangas and axes. They cut him on the head as he pleaded with them to spare his life. He offered them money and gemstones. He deals in gemstone business. He was stabbed on the left shoulder and left breast. He lost consciousness. He woke up four days later at the Mombasa Hospital. When he returned home, he found that he had been robbed of cash Kshs. 38,000 which was in his wallet, 3 kg of green garnets which he had hidden in the ceiling; DVD machine, one radio cassette player, his wife's lessa, a new T-shirt and shorts, 4 boxes of UHT milk and loaves of bread. The estimated value of the stolen goods was Kshs. 500,000. He also learnt that, his wife, Victoria Kinona (PW2) had been injured during the robbery. She had also been robbed of her mobile phone and lessa. His nephew too had been injured on the neck.

The matter was reported to the police. He was subsequently issued with a P3 Form, which was duly filed and produced in Court as an exhibit. The investigations commenced, the scene was visited by the scene visiting personnel. Photographs were taken by Sgt. David Chege (PW4) attached to the crime scene support services at Voi Police Station. On the 16th day of December 2009, the investigation officer Sgt. Gabriel Rotich received information that one suspect had been seen at Voi. He received the information from an informer. That information led to the arrest of a suspect by the name Dennis Kiio Johana. In the process, the police officers also arrested, Julius Mjomba Mwakisau (the 1st appellant herein) and another Kasungu Baya Kitsau (who was the 2nd accused in this matter). They were arrested at Mkuku Shopping Centre.

On the 18th day of December 2009, another suspect, one Timothy Nyaga Rugendo (who was the 3rd accused in the matter) was arrested. On the 29th day of December, 2009, a suspect by the name of Simon Mwangangi was arrested. He is the 2nd appellant herein. He was arrested at Voi town. The final suspect, who was the 6th accused in this matter in the trial Court, namely Joel Kalama Nzule Mwanjala was arrested. All the six suspects were charged as aforesaid.

The 1st appellant gave us sworn statement in defence. He told the Court that on the 16th day of December 2009, he woke up, took his breakfast and proceeded on with his usual business. He is a charcoal dealer at Dingai. At about 5.00 p.m. he saw two people approach him. They were in civilian clothes. They inquired into his name. He introduced himself. He was told that, he was required at the Police Station. He was led to the Police Station and placed in the cells. On the 18th day of December 2009, he was removed from the cells. It was around 10.00a.m. his finger prints were taken. He was returned to the cells. As he returned to the cells he could see very many people at the station. At 12.30 p.m. he was pulled out of the cells again and lined up on the parade with seven other people. He realised that, the people he had seen earlier in the office were witnesses at the parade. He complained to the parade officer. The officer said, he would investigate. He was returned to the cell. On the 23rd day of December 2009, five days thereafter he was brought to the Court. He denied knowledge of the offences herein and of his joint accused persons.

The 2nd appellant gave a sworn statement in his defence. He told the trial Court that on the 28th day of December 2009, he led cattle to Mwatate town for sale. He sold them off. He went to the bar to have a drink before going home. He met a woman he knew and she requested for a drink. Shortly, a man who introduced himself as a police officer, went to the bar where he was, he was angry with him, because, the

officer was claiming that, the lady, the appellant was with was the officer's lover. The officer took the woman away, and told the appellant, they should meet the following day at Voi Police Station.

The following day, the appellant went to Voi Police Station. He met the officer who introduced himself as one Lawson Tsuma. He led the appellant to the CID offices. The appellant was accused of interfering with the relationship between that officer and his wife. He was arrested and placed in the cells at Railways Police Station. He stayed in the cells for a period of six (6) days. On 3rd day of January 2010, he was driven in the complainant's motor vehicle registration number KBE 973E, from Railways Police Station to Voi Police Station. He was taken to an identification parade. He joined up seven other people. He realised that one of the witnesses was at the police reception hall as he passed by. He complained to the parade officer. He was, however, arraigned in Court on the 11th day of January 2010 after his finger prints were taken. He denied knowledge of the offence herein. Later on the 24th February 2010, his case was consolidated with another. He described his co-accused as strangers to him. He summed up his evidence by submitting that, he was surprised that, the driver who carried him, that is, the complainant herein, was actually a witness in this matter.

After considering all the evidence adduced in Court, the trial Magistrate found that the 1st appellant was positively identified by Masudi Kinona (PW9), with the aid of the light from one foot fluorescent bulb that was run by solar power. He ruled the light was adequate. He also found that the same witness (PW9) positively identified the 1st appellant on the identification parade by touching him. That, PW9 identified the 1st appellant as ***“the robber who physically took the DVD machine and also chased after PW2 as she ran out of the house.”***

In relation to the 2nd appellant, the trial Court found that, the evidence against him was led by Simon Gaiho Wacharo (PW6) and Inspector Christopher Mwang'ombe (PW8). That, he had been identified by PW6 by aid of the light from a torch, but even more so, PW6 picked the appellant on the identify parade and in Court. As a result thereof, the trial Court stated:-

“However I am satisfied that the prosecution has proved it's case beyond reasonable doubt as against the 1st and 5th accused as in Count 1 of the charge sheet. The two are hereby convicted accordingly. The 2nd count is hereby dismissed for lack of evidence.”

The appellants have appealed as aforesaid. The petition of appeal was filed on the 23rd day of March 2011. It comprises of seven (7) grounds of appeal as follows:

That the Learned trial Magistrate erred in law and fact

- **By relying on the evidence of PW9 in convicting the 1st appellant when actually from the evidence of PW1 the lights were off.**
- **In convicting the 2nd appellant on evidence of PW6 who claimed to have met the appellant outside the house and claims to have had a torch.**
- **By relying on evidence of untruthful witness PW6 who admitted that actually he did not have a torch but the torch was with assailants.**
- **By convicting the 2nd appellant when in the statement to the Police (read in Court) showed he relied on “moonlight” incomplete departure from his evidence- in-chief.**
- **By convicting the appellant despite the many contradictions in the prosecution case which ought to be exercised in favor of the appellant.**
- **By not considering at all the defence by the appellants.**

- **By not considering how the appellants were arrested as they were not known to the arresting officers.**

At the hearing of the appeal, the appellants were represented by the Learned Defence Counsel Mr. Wachira, while the State was represented by the Learned State Counsel Mr. Tanui. The defence counsel condensed all the grounds of appeal into two. He submitted that, the Learned trial Magistrate erred in relying on the evidence of PW6 and PW9, in convicting the appellants. He told the Court that, tied with that issue, was the issue of identification of the appellants. He submitted that, PW6, was a minor aged 9 years. That his evidence contradicted the evidence of all the other witnesses.

He told the Court that PW9, PW3, PW1 and PW3 all confirmed that the main door was locked. Yet PW9 testified to the contrary. Further PW9 testified that the lights were on and yet the other witnesses contradicted that evidence of PW9 when they said, the lights were put off by mama (referring to PW2). Similarly PW9 testified that the robbers took away their torches and PW2 testified that, the minors did not have any torches. He submitted that the robbery took place at night and therefore identification was critical. That, it's not clear at all, as to who switched on the lights in the sitting room where the boys were sleeping. He told the Court to consider the issue of intensity of the light. He relied on the case of:

Kennedy Maina -Vs- R. Criminal Appeal No. 14 of 2005.

He also relied on the case of:-

John Kamau Gathuku –Vs- R Criminal Appeal No. 123 of 2009.

In which it was held that, for a witness to appear before an identification parade, he has to give the description of the suspect. He told the Court that, that was not done in this matter. That, although the trial Magistrate warned himself of the dangers, of relying on the evidence of one witness only that warning was not enough. He submitted that in the case of **John Karite Mirigu –Vs- R Criminal Appeal No. 184 and 185 of 2002**, it was held that the warning is not adequate where there is conflicting evidence. That, the evidence of a single witness is not adequate where there is no evidence of recovery of the stolen goods.

In opposing the appeal, the Learned State Counsel submitted that the prosecution evidence was sufficient. He told the Court that, although the appellants were initially charged jointly with four other accused persons, the four were acquitted due to inadequate evidence. He told the Court that PW9 gave a detailed account of how the robbery took place. That, he (PW9) said he could identify the attackers, and an identification parade was held, whereupon PW9 was able to identify the 1st appellant. That, he was also able to identify the 1st appellant in Court. That, the witness also gave an account of who among the attackers, climbed on the ceiling of the house and stole the gemstones. That, PW9, was also able to identify the 4th accused who was acquitted for some reason. That, although the trial Magistrate warned himself of the danger of relying on the evidence of a single witness, but the Magistrate also had the benefit of the demeanor of the witnesses. That the evidence of PW6, told the Court he had a torch, and he was able to identify the 2nd appellant, upon his arrest. That, he was also able to pick him up on the identification parade.

In the final reply the defence counsel wondered why the 4th accused was acquitted and yet he too, was identified on the identification parade.

We have considered the grounds of appeal herein, the submission by the appellant's counsel on the same. The authorities, he has cited, and the submissions by the State Counsel in opposing the appeal.

In the case of **Odhiambo –Vs – R Criminal Appeal No. 280 of 2004 (2005) 1 KRL** it was held that;

“On a first appeal, the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and assess it and reach it's own independent conclusion. However, it must warn itself

that it did not have the benefit of seeing the witnesses when they testified as the trial Court did and therefore cannot tell their demeanor.”

In that regard, we have considered the appeals herein. We find it is not in dispute that on the 20th day of October 2009, Peter Kinona Masudi and his family members were attacked by robbers while in their residence at Musau area, in Mwatate. Eleven witnesses were called by the prosecution. The only key witnesses were Simon Gaitho Wachero (PW6) and Masudi Kinona (PW9). Masudi is a nine (9) years old boy. Court relied on evidence of these witnesses to convict the appellants. We shall therefore analyse in depth the evidence.

(PW6) Simon Gaitho Wachero testified that he was asleep when he heard his uncle Peter Kinono (PW1) screaming. He (PW6) woke up. He met someone at the doorway. The person he met was a stranger. That he (PW6) and his uncle (PW1) stay in the same compound. He had a torch and he beamed it at the stranger. He noted that, he was a stranger. He was not armed. Suddenly he was kicked on the neck by someone else, who he had not known. He ran off to the neighbours but the doors were closed. He could still hear shouts of help in their home. He noted the robbers had left. He returned to the compound. On the issue of identification of the attackers, he stated;

“I did not know how many robbers were there. I only saw one whom I had beamed. He was dressed in black. In noted his face clearly”.

Later he attended an identification parade on the 13th day of January 2009. The robbery was in the year 2008. He testified regarding the parade

“I did not see the man I had seen in the house in the parade. Actually I recognized the man on the parade. I pointed him out to the police. I had seen him with my torch light at home. He had not been doing anything. He had been in black clothes. If I see him again, I would recognize him again. I can see him here in Court. He is that man (points at 5th accused.)”

It is note worthy that, the 2nd appellant herein, was the 5th accused in the trial Court. In cross-examination by the defence counsel, Mr. Muthami, the witness stated

“I had not reached uncle Peter’s house. It was completely dark. I had my torch from my house. I came out by myself. I used my torch alone”.

He went on to state

At the parade I was with my uncle and Joshua, and Masudi and aunt and my sister Joyce and Nancy and Margaret.”

We shall now review the evidence of (PW9) Maudi Kinona. He told the Court that he was 9 years old, in standard three (3) at St. Stephen Academy at Voi. That, on the 20th day of October 2009, he went to sleep at 11.00 p.m. after supper and watching the T.V. He was sleeping in the sitting room with his bother Joshua. Joshua locked up the door. He then heard his father screaming for help. He was in the bedroom He got up. He saw robbers in the house. He saw about 15 people. He saw them stealing gemstones from the ceiling. He saw another robber stealing the radio while the other took DVD and T.V. remote. Another kicked him as he tried to go to the bedroom. He was kicked on the belly and ordered to go back to sleep. He saw the mother and the father run out of the house. He, and Joshua too ran out of the house, the robbers had already left. He saw his parents injured. That, he saw all these things with the aid of electric lights, of 1 foot fluorescent tubes. That he saw a robber armed with a panga and another with a knife. They were standing near the table so he saw them clearly. He testified that, he could recall one very clearly. He later pointed out that man at the Police station. That, he was the one who was chasing after his mother and who had taken the remote and who was armed with a panga. He identified that man as the 1st accused (who is the 1st appellant herein). He said that, he was not able to recognize any other person.

From, the judgment delivered by the Learned Trial Magistrate, the grounds of appeal and the submissions of the parties, one issue seems to be key in this matter. That issue is the **“identification”** of the appellants.

In his judgment, the trial Magistrate observed

“identification is always a thorny one in cases of robbery. I also have the problem of dealing with the identification by only one witness. I need to, and I have duly warned myself about ensuring PW9 was not genuinely mistaken about the identification of the 1st appellant”.

In the case of Kiilu & another –Vs- Criminal Appeal No. 113 of 2001. {2005} 1 KLR, the Court held that

“subject to certain well known exception, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known the conditions favouring identification were difficult.”

The Court in this case held further that, in the circumstance, what is needed is further direct or circumstantial evidence which will enable the Court to safe conviction on the evidence of a single witness.

In the instant case, the trial Magistrate held that, the evidence of PW6 and PW9 was corroborated, when the two witnesses identified the appellants on an identification parade. **BUT** the two appellants have heavily dispute the results of the identification parade. They allege that the witnesses had seen them before the parade was held. We have looked at the identification parade forms which indicates both appellants were satisfied in the manner in which the parades were conducted. However, Inspector Christopher Mwang’ombe told the Court, that, although he had a total of seven (7) witnesses, only one witness, at each parade was able to identify each suspect. In cross-examination the witness told the Court that the appellants did not complain to him that, they had been seen by the witnesses before the parade. The question is this: Was the identification parade evidence corroborative of the evidence of PW6 and PW7. It is also noteworthy that, although the 4th accused was also identified on the parade he was acquitted of both charges. In so doing the trial Magistrate stated

“The form shows PW3 had positively identified the 4th accused; it is further noted that PW3 did not recognize the 4th accused in Court.” For these reasons, doubt has been cast as the correct identification of the 2nd accused in this matter.”

We find, with due respect to the trial Court that, first and foremost, the complainant in count I Peter Kinona Masudi did not identify the robbers; he told the Court that

“I was not able to recognize any of the attackers”

Victoria Kinona, (PW2) his wife testified

“I had not been able to see any of the robbers clearly enough to recognize anybody.”

In cross-examination she stated

“I did not recognize any of them could see them but they were all strangers.”

It’s not surprising therefore out of seven witnesses at each parade only one purportedly identified each appellant herein. Even then PW6 was not in the house where the robbery took place.

He testified

“I live the same compound.”

He went to state

“I was kicked .. .

I ran off to our neighbour”

Finally he states:-

“I did not see the man I had seen at the house in the parade. Actually I recognized the man on the parade.”

Which is which. On the light issue of the light available he states;

“I had a torch I beamed at him and I noted he as a stranger”.

On the other hand PW9 is a minor. His evidence had to be treated very cautiously. Although he was sleeping in the sitting room with Joshua, Joshua did not identify any of the robbers. Joshua (PW3) testified regarding the robbers

“One a tall man came to where I as . . . He told us to sleep and not look at him. Masudi (PW9) and I then ran into grandmother’s room.

He went on to testify

“I had seen one of the robbers before. He is the one who took the radio. I knew him as Ali Kibe. He used to come home with uncle.”

He testified further

“When I looked I was able to pick out one of the robbers. I picked out one who had carried the stone”. Another day, I came again but I did not see anybody I had seen during the robbery. The man who carried the stone is in Court. He is there (moves and touches the 2nd accused on the shoulder). I have never seen the other robbers before.”

Again, it is note worthy that the 2nd accused was acquitted.

In the case of Benson Mugo Mwangi –Vs- R 2010 eKLR, the Court held that:-

“if the conditions under which identification is to be done are difficult then the standard of care required before the Court can convict on such evidence of a single witness is even higher”.
(emphasis ours)

All in all, we find that given, the robbers herein are described as numbering between 16 to 25 people. They struck the complainant’s home. The victims were asleep. The robbers were armed. They were violent. The lights were not all over the compound. Infact, the witnesses talk of beaming with a torch. Only (if at all) in the sitting room, where two young boys were sleeping. They ran to their grandmother’s bedroom. They were also attacked and injured, and the robbers were concentrated in the bedroom, asking for money and gemstones. The identification issue was tricky. Especially when most of the witnesses could not identify the appellants on the identification parade. Further still, apparently even the 2nd and the 4th accused were identified but were acquitted on reasons recorded in the judgment. By the fact that, most of the witnesses who were direct victims could not identify the robbers, only one witness purported

identification casts doubt. It is the benefit of the appellants.

We have said enough to conclude the conviction herein was unsafe. We allow the appeal and set aside the sentence of **life imprisonment** imposed upon each appellants.

We order that, they shall be set at liberty forthwith unless otherwise lawfully held.

Dated, delivered and signed in open Court at Mombasa this 25th day of September 2012.

M. ODERO

G. L. NZIOKA

JUDGE

JUDGE

In the presence of:

.....for State

..... for Appellants

Benta - Court clerk